IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

Appellants,

v.

No. 167

WALTER L. ABERNATHY and CARRIE S. ABERNATHY,

Appellees.

Appellants' Brief on Motion to Dismiss

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STATEMENT.

This case, originally appealed from the District Court of the United States for the Western Division of the Western District of Missouri to the Circuit Court of Appeals for the 8th Circuit, has, by the latter court, been transferred here, pursuant to the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto

Section 238-a. *McMillan Contracting Co. et al.* v. *Abernathy et al.*, 284 Fed., 354.

This act, providing for the transfer between the Supreme Court and the respective Circuit Courts of Appeals, of appeals taken to the wrong court, was passed by Congress to remedy the situation referred to by Chief Justice Taft in an address before the American Bar Association at San Francisco. This address is published in the Association Journal for October, 1922, the following excerpt being found at pages 603 and 604:

> "The statutes defining the jurisdiction of the Supreme Court and Circuit Courts of Appeals are not as clear as they should be. It is necessary to consult a number of them in order to find exactly what the law is, and I regret to say that without clarification by a revision, the law as to the jurisdiction of the Supreme Court and the Circuit Courts of Appeals is more or less a trap in which counsel are sometimes caught."

This case presents an illustration of this "trap" and falls within the express terms of the Act, if, as held by the Circuit Court of Appeals, the appeal to it was erroneous.

Appellants contend that the appeal was properly taken to the Circuit Court of Appeals, and that that court erred in refusing to assume jurisdiction and in transferring the case to this court. Accordingly appellants have filed herein a motion to remand the cause to the Court of Appeals, or to hear and determine the same as upon certificate from said Court of Appeals under Sections 239, 240 and 264 of the Judicial Code. Appellants' contentions respecting

the propriety of the appeal to the latter court are embraced in a memorandum filed with the motion to remand. For the reasons set forth in that memorandum appellants insist that the Act of September 14, 1922, was improperly invoked.

However, if the position taken by the Court of Appeals respecting its jurisdiction of the case be sustained by this court, the Act of Congress of September 14, 1922, applies, and appellees' motion to dismiss should be denied.

Appellees contend that the Act in question, so far as it refers to appeals taken before its passage, is unconstitutional; that the judgment in the lower court became final upon the expiration of three months' period allowed for an appeal to this court; and that rights in, to and under said judgment thereupon became vested and absolute and free from the effects of subsequent legislation. The facts are not controverted: that the judgment in the District Court was rendered July 7, 1921; that the appeal to the Court of Appeals was allowed January 4, 1922, more than three months, but less than six months, thereafter; and that the Act of September 14, 1922, was passed and approved while the case was pending on a motion to dismiss in the Court of Appeals.

Beyond question the Act, as applied to the appeal in this case, is constitutional. If the position taken by the Court of Appeals as to its jurisdiction is correct, the remedy provided by the Act was properly invoked by that court, and under its terms and pursuant to the order of the Court of Appeals this court should hear and determine the cause in the same manner as if directly and duly appealed to this court.

ARGUMENT.

Section 238-a of the Judicial Code, approved September 14, 1922, applies to the appeal in this case, and confers jurisdiction upon the Supreme Court to proceed to the determination thereof.

The only provision in the Constitution of the United States which might prevent the application of the Act to this appeal is that part of the Fifth Amendment prohibiting the deprivation of life, liberty or property without due process of law. The restriction in Article I, Section 9 of the Constitution, as to the passage of *ex post facto* laws, has no application, since that prohibition relates to criminal and penal laws only.

> *Calder* v. *Bull*, 3 Dall. 386;
> *Duncan* v. *Missouri*, 152 U. S. 377, 14 S. Ct. 570;
> *Mallett* v. *North Carolina*, 181 U. S. 589, 21 S. Ct. 730.

And except to the extent that the impairment of contracts is a violation of the due process clause, there is nothing in the Constitution making an Act of Congress invalid as an impairment of the obligation of contracts. Article 1, Section 10, with respect to such laws, is, by its terms, a restriction on the power of the state, and not of the national government.

Hence the Act is constitutional in its application to this case *unless appellees had a property right in the judg-*

ment below, of which they were deprived, without due process to law, by the order of the Circuit Court of Appeals transferring the case to this court.

The motion to dismiss is based on the contention that the Act divests *vested rights* under the judgment. It is to be noted that the words "vested rights" appear nowhere in the Constitution. Rights, vested or otherwise, are protected under the Fifth Amendment only as embraced within the term "property". What *property* had appellees in the judgment below? Of what property in said judgment have appellees been deprived by Section 238a of the Judicial Code? If any, is that deprivation pursuant to due process of law?

I.

1. Appellees' whole argument is that the Act of September 14, 1922 cannot constitutionally be made to apply to judgments **then final. This argument ignores the circumstance that an appeal was pending in this case at the time of the passage of the Act.** Appellants insist that the pendency of the appeal eliminates all question of the propriety of a retroactive application of the statute. The Act has not been applied retroactively. No final judgment has been affected.

Even if the Circuit Court of Appeals was without jurisdiction, the case was nevertheless pending in that court on appeal. The order of the District Court, entered January 4, 1922, granting an appeal to the Court of Appeals, was not void, but on the contrary suspended the operation of

the judgment below, and transferred the case to the appellate court.

This proposition of law, as to the effect of such an appeal, has been declared by the courts on many occasions. The case of *Smith* v. *Chytraus,* 152 Ill. 664, 38 N. E. 911, is a leading decision on the point. In that case the order of the lower court gave plaintiff certain relief on condition that he pay to defendant, within sixty days from the date of the order, a certain sum of money. An appeal was taken from said order and decree to the State Court of Appeals. Thereafter a motion to dismiss was sustained in said court, on the ground that the appeal should have gone to the State Supreme Court, rather than to the Court of Appeals, and that the latter court was without jurisdiction. The case was then redocketed in the lower court. In the meantime a period of more than sixty days from the date of the decree had expired, and accordingly defendant prayed the lower court for an order of dismissal, in as much as plaintiff had failed, within the sixty day period, to make the payment upon which the relief was conditioned. The court thereupon entered a final order of dismissal. On error to the Supreme Court this order is reversed. The Supreme Court holds that the appeal to the Court of Appeals, although that court was without appellate jurisdiction of the case, nevertheless operated as an appeal, and was valid as such until dismissed, and stayed and suspended the operation of the judgment below, and that the time during which the appeal was pending should be deducted from the sixty days allowed by the original order. The following portion of the opinion deals with that question (p. 669):

"It is urged by defendants in error that the appeal that was allowed and that was taken was an appeal to the appellate court, that the appellate court had no jurisdiction to entertain the appeal, and that, therefore, the appeal was void and of no effect, and that it follows that the restraining of further proceedings implied from an appeal to a court which has no jurisdiction to entertain such appeal must be without any effect also. The premises may be conceded, but we think the conclusions do not follow. In *Reynolds* v. *Perry*, 11 Ill. 534, Perry brought suit against Reynolds, and recovered judgment for costs only. Reynolds prayed an appeal to this court, and it was granted to him, and he perfected his appeal by filing an appeal bond. At that time the statute only allowed appeals where the judgment, exclusive of costs, amounted to the sum of $20, or related to a franchise or freehold. It was held that the appeal was improvidently granted, but also held that it restrained Perry from collecting his judgment. It was the right of the defendants to pray for an appeal. It was the province of the court to determine to what court of review or appellate jurisdiction the case was appealable, and to fix the terms on which the appeal might be taken. We said in *Hake* v. *Strubel*, 121 Ill. 321, 12 N. E. 676: 'The making of the order allowing appeal and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. The making of the order is an exercise of the judicial power vested in the presiding judge, but the order when made is the order of the court.' The court, then, when it granted an appeal to the appellate court, was acting judicially, and in respect to a matter that was specially committed to its charge by the statute. It had jurisdiction of the parties and of the subject-matter, and what it did, although it may have been erroneous was not absolutely void and of no effect.

> The parties had a right to rely upon it, and were bound by it, until it was set aside by some court lawfully authorized so to do. Sometimes it may be a matter of great doubt to what court a particular suit or proceeding is properly appealable. The trial court, in the first instance, must determine that question, and it determines it judicially, by an exercise of the judicial power that is vested in it. * * *
>
> Our conclusion, then is that the appeal herein to the appellate court, even though granted to a tribunal that had no jurisdiction to entertain it, operated for the time being as an appeal, and became a supersedeas, and temporarily stayed all proceedings whatever to enforce the execution of the decree."

The case of *Daly* v. *Kohn,* 230 Ill., 436, 82 N. E., 828 is to the same effect. The court reiterates that an order allowing an appeal to the Court of Appeals transfers the case to that court, even though that court has no jurisdiction of the appeal, and that proceedings below are stayed until the appeal is dismissed.

A similar question arose in *Merrifield* v. *Western Cottage Piano Co.,* 238 Ill. 526, 87 N. E. 379. Appellee there contended that the proceedings below should not be stayed by the appeal which had been taken, because the appeal was from an interlocutory order, from which no appeal was allowable. The court disposes of this contention thus:

> "Appellant contends that said order of February 18th was a final and appealable one, while appellee contends that it was interlocutory and not appealable. However that may be, the appeal was allowed as prayed, and after the filing and approval of the appeal bond that question was transferred to the Appellate Court for its decision.

When an appeal is perfected, the jurisdiction and control of the court below ceases, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree. *Smith* v. *Chytraus,* 152 Ill. 664, 38 N. E. 911; *Cowan* v. *Curran,* 216 Ill. 598, 75 N. E. 322; *Bower* v. *Chicago West Division Railway Co.,* 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81; *A. R. Barnes & Co.,* v. *Typographical Union,* 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (N. S.) 1150."

The case of *American Button-Hole, Overseaming & Sewing Machine Co.* v. *Gurnee,* 38 Wis. 533, also establishes that an appeal from an interlocutory order, although such an order is not appealable, is not a nullity, but is operative until dismissed.

It has also been held that the allowance by the court of an appeal to a party who had no right to appeal, transfers the case to the appellate court, and that any action taken by the lower court thereafter, while such appeal is pending, is void and will be set aside.

Baasen v. *Eilers,* 11 Wis. 277.

When the lower court grants an appeal from the judgment or decree, the jurisdiction of that court ceases, and it cannot disregard the appeal and proceed to carry the judgment into effect, nor can it pass upon the legality of the appeal.

Dunbar v. *Dunbar,* 5 W. Va. 567.

In *Pemberton* v. *Zacharie*, 5 La. Ann. 310, the court treats of the matter thus:

> "We consider it clear, that after the inferior court granted the appeal, its cognizance of the case in the issue joined on these exceptions terminated, until that appeal was disposed of. The case could not be pending on this point in the supreme court and the district court at the same time. (page 314).
>
> It has been contended that as this court has decided that the appeal was improperly granted, it could not have had the effect of suspending proceedings in the inferior court. But it is obvious that the effect of an appeal does not depend on the ultimate disposition which may be made of it, but on the fact that it is pending and undecided." (page 315).

There are many decisions to the effect that a judgment from which an appeal is pending cannot be pleaded as an adjudication in bar of a subsequent suit between the same parties involving the same subject matter.

Edwards v. *Bodkin*, 267 Fed. 1004;
Eastern Bldg. & Loan Assn. v. *Welling*, 103 Fed. 352;
Delk v. *Yelton*, 103 Tenn. 476, 53 S. W. 729;
Day v. *De Younge*, 66 Mich. 550, 33 N. W. 527;
Fassler v. *Streit*, 92 Neb. 786, 139 N. W. 628;
Purser v. *Cady*, 120 Cal. 214, 52 Pac. 489.

There can manifestly be no vested property right in a judgment, which is so far suspended that its existence cannot be pleaded or proven in a suit involving the very rights involved in the judgment.

The proposition that an appeal was pending in this case at the time of the passage of the Act of September 14, 1922, is supported by decisions to the effect that the filing of a suit in a court without jurisdiction of the same suspends the running of the statute of limitations. The filing of such a suit is held to be the commencement of an action. There are many such decisions:

Smith v. *McNeal*, 109 U. S. 426;
McCormick v. *Eliot*, 43 Fed. 469;
Woods v. *Houghton*, 1 Gray (Mass.) 580;
Little Rock, M. R. & T. Ry. Co. v. *Manees*, 49 Ark. 248, 4 S. W. 778;
Pittsburg, C. C. & St. L. Ry. Co. v. *Bemis*, 64 Oh. St. 26, 59 N. E. 745;
Lamb v. *Howard*, 102 S. E. 436 (Ga.);
Wilbourne v. *Mann*, 81 So. 816 (Ala.);
Blume v. *New Orleans*, 29 So. 106 (La.);
Atlanta, K. & N. Ry. Co. v. *Wilson*, 47 S. E. 366 (Ga.);

2. It must be clear from the above authorities that the case was pending on appeal in the Circuit Court of Appeals at the time of the passage of Section 238a of the Judicial Code. Such being the fact, there is no constitutional objection to the application of the Act. The statute as applied to this case simply validates an appeal improperly taken, pending at the time of its passage. Such an act does not divest any vested rights. Statutes have been sustained which correct or render immaterial defects in pending appeals vital under the

law in existence at the time of their allowance. Similar statutes have been upheld giving the appellate court jurisdiction of an appeal then pending, although no such jurisdiction existed when the appeal was taken.

In *Hepburn* v. *Curts*, 7 Watts (Pa.) 300, a statute was sustained and given application to a pending appeal, to the effect that "no action now pending on writ of error or otherwise, by partners or persons against partners or persons, shall abate or be defeated, by reason of one or more individuals being members of both firms."

In *Warton* v. *Cunningham*, 46 Ala. 590, a statute of 1870, curing a vital defect in the bill of exceptions on file in a case pending on appeal, is held to validate the appeal, although the bill of exceptions was filed and the appeal taken several months before the statute was passed.

The case of *Teel* v. *Chesapeake & Ohio Ry. Co.*, 204 Fed. 914, 123 C. C. A. 210, holds that where a necessary party defendant is omitted from a writ of error, the Circuit Court of Appeals is authorized by Sections 954 and 1005, Revised Statutes, and by the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 829, allowing the unprejudicial amendment of certain defects in writs of error to the district courts, to permit an amendment of a writ of error inserting the name of the omitted party and bringing such party in by a new citation, even though the time for suing out a new writ had expired. The court states the law as follows (page 917):

> "Such defects as this are generally curable by amendment of the writ of error and the issue of a new citation. Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character

wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted. See Act of September 24, 1789, c. 20, Sec. 32, 1 Stat. 91, Rev. Stat. Sections 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714); *Walton* v. *Marietta Chair Co.*, 157 U. S. 344, 346, 15 Sup. Ct. 626, 39 L. Ed. 725; *Knickerbocker Life Ins. Co.* v. *Pendleton, supra; Estes* v. *Trabue, supra; Thomas* v. *Green County*, 146 Fed. 970, 971, 77 C. C. A. 487 (C. C. A. 6th Cir.) affirmed in 211 U. S. 598, 601, 29 Sup. Ct. 168, 53 L. Ed. 343. In *Gilbert* v *Hopkins*, 198 Fed. 849, 117 C. C. A. 491 (C. C. A. 4th Cir.), a writ of error seasonably sued out was permitted to be amended by inserting the name of an omitted party, although the time fixed for suing out such a writ had then expired, and the new party was required to be brought in by a new citation.

The time for allowing a new writ of error has likewise expired in the instant case; but in view of the statutory provisions before alluded to, and of section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 U. S. Comp. St. 1901, pp. 552), we are disposed to enter a rule on the plaintiff in error to show cause, within ten days after the order is entered, why the Chesapeake & Ohio Railway Company of Kentucky should not be made a party defendant to her proceeding in error and for defendant in error so to show cause why the writ of error shoud not be permitted to be amended by inserting the name of that company and a new citation to be issued to it."

Gilbert v. *Hopkins*, 198 Fed., 849, 117 C. C. A., 491, referred to in the above excerpt, is to the same effect.

The case of *Freeborn* v. *Smith*, 2 Wall.160, is in effect a controlling authority on the present motion. The plaintiff in that case had obtained a judgment against the defendant in

the Supreme Court of Nevada Territory. A writ of error was issued to this judgment from the Supreme Court of the United States and the record of the case was filed in this court. Thereafter, Nevada was admitted to the Union, the enabling act, however, making no provision for the disposal of cases then pending in this court on error or appeal from the territorial courts. This court had previously held, in a number of cases, that in such a situation, this court had lost all jurisdiction of and power to proceed with such pending cases. About one year after the admission of Nevada into the Union, and more than two years subsequent to the filing of the record of the case in this court, Congress passed the following statute:

> "That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon."

A motion to dismiss had been filed in the case before the statute was passed, but the court, being advised that a bill was before Congress touching the matter, suspended action on the motion till it was seen what Congress might do. After the passage of the act, the motion to dismiss was renewed and was argued at great length by counsel for the defendant. The

argument in support of the motion is identical with that put forward by appellees in this case. Every contention as to the finality of judgments and vested rights and opening up of settled adjudications, made by counsel for appellees herein, was strongly urged upon the court in that case, as shown by the report. The court, however, was not impressed with the reasoning, and denied the motion to dismiss. In the following language the court strikingly disposes of the objections to the act (pages 173, 174, 175):

> "It is objected to the act of 27th of February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded. * * * What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well setlted that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending, and give a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. * * * If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. 'The truth is,' says Chief

> Justice Parker, in *Foster* v. *Essex Bank*, 'there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

It is difficult to see why this case of *Freeborn* v. *Smith*, is not conclusive of the present question. The Supreme Court in that case had no jurisdiction of the appeal at the time of the passage of the Act. The case had, however, previously been taken to the Supreme Court, and, in a sense, was pending in that court when the Act was passed. Congress then says that all cases heretofore prosecuted on writ of error or appeal to and now pending in the Supreme Court, of which that court had no jurisdistion by reason of the omission of a saving clause in the Nevada enabling act, may be heard and determined in said court. In precisely the same manner, the Act of September 14, 1922, provides that cases theretofore appealed to and then pending in the Court of Appeals, as to which that court has no jurisdiction, shall not be dismissed, but shall be transferred to the Supreme Court. If the Act of September 14, 1922 had provided that the Court of Appeals should hear and determine such causes, instead of transferring them to this court, the statutes would be almost identical. As to the power of Congress to enact them, there is no possible distinction.

If Section 238-a might constitutionally have vested the Court of Appeals with jurisdiction of this case (as the

statute in *Freeborn* v. *Smith* conferred jurisdiction upon the Supreme Court), it is no objection to the Section that, instead, it directs a transfer of the case to this court. If the appeal is at all subject to the legislative power of Congress, Congress may vest jurisdiction in either court, at its discretion. Cases pending on appeal in one appellate court, may, without the violation of any constitutional guaranties, be, by statute, transferred to another appellate court for hearing and disposition.

Duncan v. *Missouri*, 152 U. S., 377, 14 S. Ct., 570;
Zellars v. *Surety Co.*, 210 Mo., 86, 108 S. W., 548;
Branson v. *Studebaker*, 138 Ind., 147, 33 N. E., 98.

3. The same principle as to the power of the legislature to legislate concerning pending controversies is applied in another line of similar cases.

It is well settled law that a statute, passed subsequent to the filing of a suit in a court which has no jurisdiction of the action in question, may vest that court with jurisdiction of the case, whether its lack of jurisdiction be as to the parties to the suit or as to the subject matter of the action. For example, a statute increasing the jurisdictional amount involved in suits which may be filed before a justice of the peace, may have the effect of vesting the justice with jurisdiction of cases filed before the act was passed, although no jurisdiction obtained in such cases prior to the act. Similarly, a jurisdictional requirement that the justice of the peace reside in the township in which the subject-matter of the action is located, or in which one of the parties re-

sides, may be abolished by statute, and thereby suits previously filed, which at the time were not cognizable by the justice, may be brought within his jurisdiction.

Cunningham v. *Dixon*, 15 Del., 163, 41 Atl., 519;
Mather v. *Chapman*, 6 Conn., 54;
Muncie National Bank v. *Miller*, 91 Ind., 441;
Walpole v. *Elliott*, 18 Ind., 258;
Wilbourne v. *Mann*, 81 So., 816 (Ala.)

II.

It seems clear from the foregoing, that the appeal in this case was pending in the Court of Appeals when Section 238-a was enacted, and that therefore there is no constitutional objection to the application of the Act. Appellees' brief contains no suggestion that the Act cannot apply to pending appeals. Their whole argument is that *final* judgments cannot be affected by subsequent legislation.

1. On the contrary, the authorities are strong to the effect that it is within the power of Congress to make such a statute applicable even to cases wherein no appeal was pending when the statute was approved, and the time for appeal had expired.

It is well settled that litigants have no vested right in any particular remedy allowed by law for the enforcement of rights of action; and a remedy available when suit was filed or judgment obtained may be changed or abolished at the will of the legislature, provided only that a reasonably good remedy still remains or has been substituted for the

Appeals of the State, the judgment was affirmed in July, 1867. On August 22, 1872, West Virginia adopted a new constitution, containing the following section:

> "No citizen of this State who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

Thereafter, the original defendant brought this bill in equity against the plaintiff, to perpetually restrain the enforcement of said judgment, on the ground that the cattle were taken during the rebellion, according to the usage of civilized warfare. The court gave a decree as prayed. An appeal therefrom having been denied, the case is, on error to this court, affirmed. The court says:

> "The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this had been decided in this court are *Calder* v. *Bull*, 3 Dall. 386; *Satterlee* v. *Matthewson*, 2 Pet. 380; *Sampeyreac* v. *United States*, 7 Pet. 222; *Watson* v. *Mercer*, 8 Pet. 88; and *Freeborn* v. *Smith*, 2 Wall. 160. In the latter case, Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in *Foster* v. *Essex Bank*, 16 Mass. 245: 'The truth is there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.'

Many other cases might be cited in which it was held that retroactive statutes, when not of a criminal character, though effecting the rights of parties in existence, are not forbidden by the Constitution of the United States."

The lien of a prior final judgment may be abrogated by statute.

Snyder v. *Brewing Co.*, 173 Ind. 659, 90 N. E. 314;
Curry v. *Landers*, 35 Ala., 280;
Daily v. *Burke*, 28 Ala., 328;
U. S. v. *Sturgis*, 14 Fed. 810.

The right to revive a judgment previously obtained may be abolished by statute, though such a right existed when the judgment was rendered.

Bartol v. *Eckert*, 50 Oh. St. 31, 33 N. E. 294;
Gaffney v. *Jones*, 44 Wash., 158, 87 Pac. 114.

The time within which the lower court may, for certain causes, vacate the judgment, may be extended by subsequent statute, enacted after the expiration of the period formerly allowed.

Marston v. *Humes*, 3 Wash. 267, 28 Pac. 520.

The following is an excerpt from the opinion in the latter case:

> "The said act amending section 109 did not go into effect until some 10 months after the rendition of the judgment in question, and it is contended by petitioners that, inasmuch as under said section 109, as it stood at the time of the rendition of their judgment, the relief thereunder was confined to five months, that at the expiration of that time their interest in said judgment became a vested one, so far as said section 109 is concerned; and that thereafter no amendment of said section could affect their rights. With this contention, however, I cannot agree. Their right in the judgment did not become vested until the court had lost all power to relieve against the same, whether under section 109 or any other provision of the Code; and not being vested, it was competent for the legislature to extend or change the time within which it could be attacked in the court where rendered by any legislation which it thought proper to effect such result."

The time for redemption from prior judgments may constitutionally be extended.

Dunn v. *Dewey*, 75 Minn., 153, 77 N. W. 793.

The right to interest on prior judgments, allowed by law at the time of their rendition, may be abolished by subsequent legislation.

Morley v. *Lake Shore, etc. Ry. Co.*, 146 U. S. 162, 13 S. Ct., 14;
Read v. *Mississippi County*, 69 Ark. 365, 63 S. W. 807, affirmed, 188 U. S. 739, 23 S. Ct. 849;
Wyoming Nat. Bk. v. *Brown*, 7 Wyo., 494, 53 Pac. 291.

6. The courts of last resort have sustained a great variety of retroactive statutes affecting, very materially, contract and property rights.

A statute abolishing the usury law may be taken as a typical example. A promissory note, unenforceable when made, because usurious, may be validated by a subsequent repeal of the usury statute. This court, in the leading case of *Ewell* v. *Daggs*, 108 U. S. 143, so states the law:

To the same effect are:
Peterson v. *Berry*, 125 Fed. 902;
Coe v. *Miller*, 77 So. 88 (Fla)

In like manner, contracts and deeds unenforceable (or even void) when entered into because of some failure

to comply with legal requirements, may be given validity by subsequent statutes changing or repealing the statutes in force at the time of their execution.

Satterlee v. *Matthewson,* 2 Pet. 380;
Watson v. *Mercer,* 8 Peet. 88;
Randall v. *Kreiger,* 23 Wall. 137;
Gross v. *U. S. Mortgage Co.,* 108 U. S. 477;
West Side Belt Ry. v. *Pittsburg Construction Co.,* 219 U. S. 92, 31 S. Ct., 196;
Jenkins v. *Union Savings Assn.,* 132 Minn., 19, 155 N. W. 765;
Clark v. *Dorr,* 156 Ind., 692, 60 N. E. 688;
Sullivan v. *Ammons,* 95 Miss., 106, 48 So. 244.

The leading cases on the point are reviewed by the court in *West Side Belt Ry.* v. *Pittsburg Construction Co.,* 219 U. S. 92, 31 S. Ct., 196, to which reference is especially made.

Of like effect are curative statutes, validating defects in prior municipal bond elections. Such statutes are held to be constitutional, although, but for them, the bonds would be unenforceable. In *Camp* v. *State,* 71 Fla., 381, 72 So. 483, the court, in upholding such a statute, declines to follow the contention that it divests vested rights.

This court in *Utter* v. *Franklin,* 172 U. S. 416, 19 S. Ct. 183, sustained the constitutionality of a subsequent statute curing defects in a municipal bond issue, although prior to the passage of the act the bonds had been adjudged void by this court.

A void marriage may be rendered valid by a statute subsequently enacted, even though vested property rights are thereby affected.

Goshen v. *Stonington,* 4 Conn., 209.

An unlicensed physician, unable to recover the value of the services rendered by him, by the law in force at the time of their performance, may acquire such a right by a change in the law.

Hewitt v. *Wilcox,* 1 Metc. (Mass) 154.

An occupying claimant statute, giving to occupying claimants the right of reimbursement for improvements made on the land, may be applied retroactively with respect to improvements as to which no such right previously existed.

Claypoole v. *King,* 21 Kan., 602.

The following decisions uphold similar types of retroactive statutes affecting property interests:

Independent School Dist. v. *Smith,* 181 N. W. 1 (Ia.)

Scales v. *Otts,* 127 Ala., 582, 29 So. 63;

Royston v. *Miller,* 76 Fed. 50;

Boss v. *Roanoke Navigation Co.,* 111 N. C. 439, 16 S. E. 402.

In *Legal Tender Cases,* 110 U. S. 421, an Act of Congress making United States treasury notes legal tender for the payment of private debts is held to be constitutional, as to debts incurred both before and after its passage.

The case of *Foster* v. *Essex Bank,* 16 Mass., 245, is a leading case with respect to the validity of a statute which continued certain corporations in existence for a period of three years after their charters would otherwise have expired, for the purpose of suing and being sued. It was ably argued that such a statute was invalid, as an impairment of vested rights, but the court upheld the Act. The court, at page 273 of the opinion, says:

> "Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration. The statutes of limitation, operating upon contracts already in force:—The suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period:—The statutes made for curing defects in the proceedings of courts, towns, officers, etc., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a legislatnre, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

The same court, in *Converse* v. *Ayres,* 197 Mass., 443, 84 N. E. 98, in sustaining a statute giving judgment cred-

itors of corporations greater rights as against stockholders, says:

> "It thus being obvious that as the law stood, while resident stockholders could be made to respond, foreign stockholders escaped, further legislation was enacted to supplement existing statutes, by providing a form of procedure which would remove the jurisdictional difficulty."

A statute very similar to the one involved in the above case was upheld in *Moore* v. *Riply*, 106 Ga., 556, 32 S. E. 647.

7. It is well established that a statute cutting down the period of a prior statute of limitations may apply to existing rights of action.

> *Terry* v. *Anderson*, 95 U. S. 628;
> *Koshonong* v. *Burton*, 104 U. S. 668;
> *Wheeler* v. *Jackson*, 137 U. S. 245.

Furthermore, it is the established law in this court, and in many state tribunals, that an act is valid which removes the bar of a statute of limitations the period of which has expired. *Campbell* v. *Holt*, 115 U. S. 620, is the leading case on the point. The reasoning of the court is as follows:

> "It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.
>
> It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporate hereditaments. But when he got beyond this although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad* v. *Blossburg and Corning Railroad,* 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

There was a similar holding by this court in *Stewart* v. *Kahn,* 11 Wall. 493, with respect to the Act of June 11, 1864, suspending the running of the statute of limitations during the Civil War. The court says:

"A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us, that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time

of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitues the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purpose of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were calleed to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislature of this character. We are of the opinion that the meaning of the statute is that the time which elapsed while the plaintiff could not prosecute his suit, by reason of the rebellion, whether before of after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived."

The Federal Transportation Act of February 28, 1920, paragraph f, of section 206, provides:

"The period of federal control shall not be computed as a part of the period of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control."

In *Standley* v. *United States Railroad Administration* (D. C. Ohio), 271 Fed. 794, it was held that the above provision was applicable to a cause of action which was fully barred under the law as it stood in Ohio before the approval of the Transportation Act. The court, said (p. 795):

> "This language applies to plaintiff's cause of action, and admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation. * * * Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statutes of limitations aganst causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. *Campbell* v. *Holt*, 115 U. S., 620; 12 Corpus Juris, p. 780, Section 576."

A like conclusion with respect to the same federal statute was reached in *Wenatchee Produce Co.* v. *Great Northern Ry. Co.* (D. C. Wash.) 271 Fed. 784.

The following state decisions, among others, are to the same effect:

Danforth v. *Groton Water* Co., 178 Mass. 472, 59 N. E. 1033;

Jackson Hill Coal & Coke Co. v. *Board of Commissioners* 181 Ind. 335, 104 N. E. 497.

In *Hinton* v. *Hinton*, 61 N. C. (1 Phil. L.) 410, it was held that a statute giving a widow six months in which to dissent from the provision of a will and elect to take dower as at common law, does not confer a right of dower, but is a statute of limitations upon that right, and therefore that a later statute extending the time for such dissent, is constitutional, and applies to a case barred before its passage.

8. The foregoing decisions, cited under subdivision II of this memorandum, seems to establish a proposition of law which should be conclusive of this controversy. That proposition is variously stated in the cases. It appears in the following forms, among others: "There is no such thing as a vested right to do wrong;" "There is no vested right to defeat a just debt;" "A vested right is one of which a person cannot be deprived without injustice;" "A party has no vested right in a defense based upon an informality not affecting his substantial equities;" "There is no vested right in a remedy or rule of procedure;" "The theory of vested rights does not prevent the curing of mere irregularities." None of these formulae can be applied, in a rule of thumb fashion, to a particular statute, as a definite unanswerable test of constitutionality. Certain difficulties of application are inherent in them all. At the basis of them all, however, there is a real principle of law. Justice Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts, in the case of *Danforth* v. *Groton Water* Co., 178 Mass., 472, 59 N. E. 1033, summarized the cases, and the rule established by them, as follows:

> "But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

The decision in *Danforth* v. *Groton Water Company* is so precisely in point here that the entire opinion may be referred to as supporting the position of appellants *in toto*. Justice Holmes has rightly deducted from the cases the real principle at their basis. Under that principle, the power of Congress to enact Section 238-a of the Judicial Code really depends upon the equity, or moral worth, or substantial justice of such legislation as set over against the moral worth or value of the right which the statute takes away.

There is little substantial moral worth in the right which appellees are asserting. If the judgment below be a proper one, appellees will not be injured by a further review of the case. If that judgment is wrong and should be reversed, no equitable right is denied by rehearing and reversal.

On the other hand there are very strong equities in favor of the statute. The language of Chief Justice Taft quoted at the beginning of this brief characterizes as a "trap" the condition existing before the enactment of the statute. The contention of appellees is that while Congress may properly provide relief for appellants who have not yet fallen into the "trap" no help can be extended to an unfortunate victim already entrapped. Certainly every in-

tendment should be made in favor of a statute intended to prevent a miscarriage of justice in a matter of simple appellate procedure.

A very able article by the Hon. Charles W. Bunn, of St. Paul, Minnesota, with respect to the appellate jurisdiction of this court, appearing in the Harvard Law Review for June, 1922, at page 902 begins as follows:

> "The jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is far from that."

The court should not make litigants suffer from this ambiguity in the statutes in the absence of a clearly compelling consideration. There is certainly no justice in penalizing the appellant to the extent of the loss of his entire cause of action, because his attorney cannot determine from the prior decisions of this court whether the appeal should be brought here or go to the Court of Appeals.

9. Much is made by appellees of the fact that the appeal to the Circuit Court of Appeals was not taken until after the expiration of the three months' period for an appeal to the Supreme Court. There is nothing whatever in this point. If, as contended by appellees, the appeal to the Court of Appeals was a nullity, then it could have made no difference that such appeal was attempted prior to the expiration of the three months rather than thereafter. In either event, under the contention, there would have been no *real* appeal, and hence the judgment would have been unappealed from during the allowed time. The time

of the appeal to the Court of Appeals is entirely immaterial.

This court has already sustained the validity of section 238-a as applied to a pending appeal to the wrong court in a criminal case, in *Heilter* v. *United States,* 43 Sup. Ct. 185. This decision seems to be a direct authority for denying the motion to dismiss herein. Chief Justice Taft, rendering the opinion of the court in that case, says of Section 238-a:

> "This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress."

The judgment below in that case was entered more than sixteen months before the approval of Section 238-a, yet the court applies the section and transfers the case to the proper court.

III.

The sole basis for the motion to dismiss is the claim that Section 238-a is unconstitutional as applied to the present appeal. The determination of this question in favor of appellees would dispose of the appeal without an opportunity for a hearing on the merits. This is the situation in both the Abernathy and Hagerman cases pending here. The third case, involving identical questions on the merits, was retained by the Court of Appeals because of a diversity of citizenship which did not appear in the Abernathy and Hagerman cases. It has been argued in that court, and will without doubt come to this court after decision there.

In view of the gravity of the constitutional question and of the recognized policy of this court not lightly to set aside acts of Congress, we respectfully request an opportunity to argue orally the motion dismiss, and also the motion to remand, by special assignment, or if that be impossible, then at the argument on the merits. If our position can be made clear to the court, we believe there can be no question but that jurisdiction will be retained.

Respectfully submitted,

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SAM'L J. MCCULLOCH,
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